



HEIRS OF RUDOLPH WALTON

186 IBLA 269

Decided November 2, 2015



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
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HEIRS OF RUDOLPH WALTON

IBLA 2013-185

Decided November 2, 2015

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying request to reinstate a Native allotment application. AKA-01494.

Affirmed as modified.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

BLM properly declines to reinstate and readjudicate a Native allotment application for the conveyance of approximately 47 acres of Federal land, which the General Land Office adjudicated with administrative finality in 1921, when an appellant does not preponderate in showing that the applicant originally had applied for additional lands, which would have resulted in an allotment totaling 160 acres, as permitted under the Act of May 17, 1906, 43 U.S.C. §§ 270-1 through 270-3 (2012), and that the General Land Office had rejected the application as to such additional lands based on a disputed question of fact, without affording the applicant the notice and opportunity for a hearing now required by *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976).

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

BLM improperly invokes the doctrine of administrative finality in rejecting a request for reinstatement of a Native allotment application based on a General Land Office decision holding the original application for rejection, pending the applicant's submission of a metes-and-bounds description of the lands claimed, since a decision holding an application for rejection is interlocutory in nature, and not subject to appeal.

APPEARANCES: Allen A. Bell, Esq., Sitka, Alaska, and Walter T. Featherly, Esq., and Jessy J. Vasquez, Esq., Anchorage, Alaska, for Heirs of Rudolph Walton; Steve Scordino, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE SOSIN

The Heirs of Rudolph Walton (Heirs) have appealed from a June 11, 2013, decision of the Alaska State Office, Bureau of Land Management (BLM), denying their request to reinstate their ancestor's Native allotment application, AKA-01494, for the purposes of adjudication under the Alaska Native Allotment Act (Act of May 17, 1906), 43 U.S.C. §§ 270-1 through 270-3 (1970).¹

Because we are not persuaded that the Heirs have established any error of fact or law in BLM's denial of their request to reinstate their ancestor's Native allotment application, we affirm BLM's June 2013 decision, as modified.

Background

A. Walton's 1912 and 1920 Native Allotment Applications

On January 2, 1912, Rudolph Walton (Walton) filed with the General Land Office (GLO) a completed Native allotment application pursuant to the 1906 Act (Juneau 01494, now AKA-01494), personally signed by him and dated December 27, 1911. Walton described the land sought as "160 acres on Biorka Island[] (Symonds Bay) as outlined on Chart 8237 in possession of the [U.S.] Surveyor General, same being unsurveyed." Dec. 27, 1911, Application at 1.^{2,3} The application form

¹ Initially, a notice of appeal was filed on behalf of the Heirs by Allen A. Bell, Esq. Thereafter, Bell informed the Board that the Regional Solicitor had opposed his representation; Bell did not, however, abandon his representation of the Heirs. Later, a statement of reasons for the appeal was filed on behalf of Merle Stewart and the other heirs of Walton by Walter T. Featherly, Esq., and Jessy J. Vasquez, Esq. We thus deem the Heirs to be represented by all three counsel – Bell, Featherly, and Vasquez.

² Biorka Island was reserved by Executive Order No. 1133, issued by President Taft on Oct. 19, 1909, for naval purposes, for use as a wireless telegraph station. The Executive Order was revoked on Apr. 27, 1956, by Public Land Order No. 1296, which, subject to valid existing rights, withdrew a total of 939.51 acres of land on Biorka Island from all forms of appropriation under the public land laws, and reserved them

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instructed the applicant to describe the lands, if unsurveyed, “by metes and bounds, beginning with some permanent natural object that can be readily identified or some permanent monument set for the purpose,” *id.* at 1 n.3, but Walton did not provide such description. The application also included a corroborative affidavit signed by two witnesses, each of whom attested to the fact that Walton was a “native-born Indian of full blood,” residing in Alaska and who was claiming the described 160 acres of land, which he had occupied “all my life,” as the head of a family. *Id.* at 2.

In an April 4, 1912, letter, GLO held Walton’s application for rejection because it contained an insufficient land description, by metes-and-bounds, and thus GLO could not determine whether Walton impermissibly claimed more than was allowed along the shore line. See Letter to Walton from Register, Land Office, GLO, dated Apr. 4, 1912. Despite his receipt of the letter on April 10, 1912, as evidenced by his signature on a Registry Return Receipt, we find no evidence in the record that Walton took immediate action to provide a metes-and-bounds description of the land he claimed.

In another letter to Walton, dated May 11, 1912, GLO stated that an investigation by the U.S. Navy Department disclosed the presence of two cabins “on an area of about one acre,” which Walton “had cleared and w[as] using for garden purposes,” and where Walton temporarily resided. Letter to Walton from Commissioner, GLO, dated May 11, 1912, at 1. GLO further noted that “the land actually used, or for the limit of 160 acres” permissible under the 1906 Act, would not interfere with the Navy’s establishment of a telegraph station on the Island, and thus the Navy was agreeable to modifying the Executive Order, with the concurrence of the Interior Department, segregating out the land claimed by Walton, provided land was reserved for the Navy’s use as a suitable landing place on Symonds Bay, with access to the station. *Id.* GLO stated, however, that before taking such action, it previously had forwarded to Walton “copies of the U.S. Coast and Geodetic Survey Charts Nos. 8240 and 8237,” on which were depicted the location of the landing place and station access. *Id.* at 2. It further stated that Walton had been requested to “indicate on the Chart No. 8237[] the specific position and quantity of the land occupied or claimed by

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for the use of the Civil Aeronautics Administration and U.S. Coast Guard. See 21 Fed. Reg. 2946 (May 3, 1956).

³ We found no copy in the record of Chart No. 8237, on which was outlined the land claimed. See Letter to Sitka Tribe of Alaska from Chief, Branch of Native Allotment Adjudication, Alaska State Office, dated Feb. 2, 1999, at 1 (“This chart is not in the file [obtained from the National Archives and Records Administration (NARA)].”).

you on said island,” and to forward the Chart to the U.S. Surveyor General, who had been directed to survey the Island, segregating out Walton’s allotment claim, whereupon Walton could properly apply for and obtain an allotment of the land, pursuant to the 1906 Act, following modification of the Executive Order.⁴ *Id.* GLO further stated that “it appears . . . that without waiting for the island to be surveyed and the segregation of your claim therefrom,” Walton had applied for the land claimed by him on the Island, but that his application was held for rejection:

[Y]ou were furnished with a blank application to execute, which you ‘filled out’ and returned to the local land office, and . . . on April 4, 1912, the register held your claim for rejection, for the reason that there is no sufficient description of land by metes and bounds to enable this office to determine whether more than 80 chains is appropriated along the shore line.

Id. at 3.

U.S. Surveyor Warner surveyed the Island, including the U.S. Naval Reserve, Walton’s allotment claim, and the reservation for the landing place and roadway, under U.S. Survey (USS) No. 406, Alaska, in April 1914.⁵ He thus surveyed an area encompassing a total of 1,676.39 acres, of which 1,631.89 acres were denoted as the “U.S. Naval Reserve,” 44.5 acres were denoted as “Rudolph Walton’s Indian Allotment,” and 2.79 acres were denoted as “Roadway and Landing reserved through Allotment Land.”⁶ Plat of U.S. Survey No. 406, Alaska. The Allotment encompassed a narrow strip of land at the head of Symonds Bay, on the northern coast of Biorka Island, sandwiched between the Bay and Rocky Cove, on the southern coast of the

⁴ The Executive Order was not modified during the pendency of Walton’s allotment application. Such action was unnecessary, however, so long as it was established that Walton’s qualifying occupancy of the claimed land began before the 1909 reservation. See, e.g., *Forest Service (Heirs of Frank Kitka)*, 133 IBLA 219, 222-23 (1995).

⁵ BLM performed a subdivisional survey of USS No. 406, Alaska, in July 1999. That survey, which was accepted on Nov. 14, 2000, appears, *inter alia*, to have resurveyed the boundaries of the “Rudolph Walton Allotment Land.” The survey plat was officially filed on Jan. 5, 2001.

⁶ Given the 2.79 acres set aside for the reservation for the landing place and roadway within the allotment claim, the surveyed exterior boundaries of Walton’s allotment claim actually encompassed a total of 47.29 acres.

Island. The U.S. Surveyor General approved the survey on September 3, 1914. Letter of Commissioner to the Secretary of the Interior, dated Apr. 11, 1921, at 1.

Six years after the survey, in a January 29, 1920, letter to the Secretary of the Interior, Howard D. Stabler, Esq., Walton's attorney, asked about the status of Walton's allotment claim. The Assistant Commissioner, GLO, responded in a March 3, 1920, letter, stating that the 1914 survey of the U.S. Naval Reserve had denoted "a tract of 44.5 acres which is surveyed as an allotment of Rudolph Walton," along with a 2.79-acre reservation "through the allotment" for the landing and roadway. Letter from Assistant Commissioner, dated Mar. 3, 1920, at 1.

On April 11, 1920, Walton filed a second completed Native allotment application, AKA-01494, personally signed by him and dated March 22, 1920, with GLO, pursuant to the 1906 Act. The application was similar to the December 1911 application, except that it made no mention of that application, and, indeed, Walton personally swore that "I have not heretofore made application under this [A]ct."⁷ However, Walton described the land sought more fully than in his December 1911 application, including a lengthy metes-and-bounds description generally tied to the monuments of the 1914 Survey. Although the application generally noted that the land sought totaled 44.5 acres, the description stated that the parcel, described by metes-and-bounds, "contain[ed] 47.29 acres," and was subject to a reservation for a landing place and roadway through the allotment claim to the U.S. Naval Reserve. The landing place and roadway, which were similarly described by metes-and-bounds, were said to encompass a total of 2.79 acres. Walton attested to occupancy of the claim since 1870.

Walton also filed a "Notice," dated March 25, 1920, in conjunction with his second allotment application, which he signed, as did his attorney (Stabler). The "Notice" generally described, in typewriting, the land claimed by him under the 1906 Act, as follows: "That tract excluded, by actual survey, from [U.S.] Survey No. 406 of the U.S. Naval Reserve on Biorka Island, Territory of Alaska, and the exclusion is described by metes and bounds in the field notes and delineated on the plats of said survey, containing approximately 160 acres, more or less." However, the typewritten number "160" was crossed out and in its place "44.50 acres" was written in by hand.

⁷ Despite the fact that Walton's attorney (Stabler) had earlier acknowledged in the Jan. 29, 1920, letter to the Secretary that the Island was "reserved for Naval Purposes," of which Walton himself had been apprised by GLO's May 11, 1912, letter, Walton also swore, in his March 1920 application, that "the land described [i]n [the application] is not reserved by authority of any act of Congress or embraced in any reservation made by Executive Order or Proclamation of the President."

GLO undertook a field investigation of Walton's allotment claim on July 20, 1920, reporting the results in a September 25, 1920, letter to the Commissioner. GLO stated that Walton was a "well-to-do [N]ative" of "above" average intelligence, who was approximately 50 years old, and resided in the town of Sitka, where he operated a general store. Letter to Commissioner, dated Sept. 25, 1920, at 2. It further noted that Walton, who was born on the Island and had resided there intermittently his entire life, although at very infrequent intervals in his later years, had used the claimed land for subsistence purposes, and built improvements on the land, as follows:

The sole use he makes of the place is a summer home while fishing, and in winter, when business is quiet, he traps some on the island. The improvements consist of a shack 15x20 feet, made of boards and poles, with a sleeping bunk made of cedar boughs. There is a hole in the roof for smoke to escape out of. There is another dilapidated old shack 12x12 feet. These improvements are fenced in one enclosure 75x225 feet. Neither of the shacks are habitable in the winter time.

Id. GLO noted that on April 11, 1920, "Walton filed an amended application, describing the land in accordance with Mr. Warner's survey," and concluded that the land claimed, under the "amended" application, was "practically the same as surveyed" under USS No. 406, Alaska. *Id.* GLO recommended issuance of a certificate of allotment "for the land applied for under [the] amended application." *Id.* at 3.

In an April 11, 1921, letter, the Commissioner, after recounting the fact that Walton had filed two Native allotment applications that were deemed to be for the "same land," recommended to the Secretary that the application be approved and a certificate of allotment issued to Walton, as to the land described, by metes-and-bounds, in the second application, in accordance with USS No. 406, Alaska. Letter of Commissioner to the Secretary of the Interior, dated Apr. 11, 1921, at 1. GLO issued a Certificate of Allotment (NA0019210505) to Walton on May 5, 1921, for 47.29 acres of land, as described by metes-and-bounds in the March 1920 allotment application, that had been surveyed under USS No. 406, Alaska, subject to a 2.79-acre reservation for a landing place and roadway. The Certificate stated that the allotted land was to be deemed "the homestead of the allottee and his heirs in perpetuity." The Commissioner transmitted the Certificate to the Register for delivery to Walton. Walton's Native allotment case was closed by GLO on May 5, 1921.⁸

⁸ According to a June 19, 1979, Master Title Plat, BLM has placed the land allotted to Walton in protracted secs. 7 and 8, T. 58 S., R. 63 E., Copper River Meridian, Alaska, on Biorka Island, at the head of Symonds Bay. All of the land in the township is part of

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Thereafter, the United States took the entirety of the 47.29-acre parcel of land allotted to Walton through condemnation proceedings initiated at the request of the Secretary of the Navy. The proceedings concluded on July 27, 1940, with issuance of a Final Judgment by the United States District Court for the Territory of Alaska on a declaration of taking in *United States v. 44.5 Acres of land, more or less, on Biorka Island*, Docket No. 4498-A. The Judgment discloses that Walton agreed to accept payment in the amount of \$500, deposited with the court, as compensation for whatever interest he had in the land, that his existing heirs-at-law had agreed that they had no right to the land or compensation for the land, and that the compensation, which would be paid to Walton, was deemed just compensation for the taking of the land.

Walton died in 1951.

B. Heirs' Request to Reinstate Walton's Native Allotment Application and BLM's 2013 Decision

In a document dated December 4, 2007, the Sitka Tribe of Alaska (Tribe), acting on behalf of the Heirs, requested that BLM issue a supplemental Certificate of Allotment for the additional 112.71 acres of land the Tribe claimed was originally encompassed by Walton's December 1911 application. The Tribe stated that Walton "applied for a 160 acre allotment but his application was arbitrarily amended and reduced to 47.29 acres," without "the opportunity for a hearing."⁹ Request for 112.71 Acres Previously Deducted from Allotment in Error, dated Dec. 4, 2007, at 1. Attached to the Tribe's request was a map (Ex. B) purporting to depict Walton's original 160-acre allotment claim. Exhibit B is simply a copy of the Master Title Plat on which has been drawn a larger parcel of land, surrounding the surveyed allotment claim. In addition, the Tribe provided the August 14, 2006, and December 4, 2007,

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the Tongass National Forest, which was established by Proclamation No. 846, issued by President Roosevelt on Feb. 16, 1909. 35 Stat. 2226, 2228 (1909).

⁹ The Tribe stated, at page 2 of its Dec. 4, 2007, letter, that "the [March 1920] amended application reducing his original allotment claim . . . was not signed by Mr. Walton." However, the copy of the March 1920 application, attached to the December 2007 letter (Part of Ex. E), and to the SOR (Ex. M), had the page with the "Corroborative Affidavit," "Nonmineral Affidavit," and certification by the Register, but lacked the signature page. That page, wherein Walton asserted that the land sought "contain[ed] 44.50 acres" and personally swore, *inter alia*, that he was a full blood Indian, born and now residing in Alaska, who was claiming the land, occupied by him since 1870, as head of a family, is part of the copy of the application provided by BLM, along with the rest of the record. It clearly bears Walton's signature.

affidavits, respectively, of Steve Henrikson, who married Walton's granddaughter, and Donald "Duck" Didrickson, who knew Walton from 1938 to 1951, both of whom attested, based on their conversations with Walton's relatives or Walton, to the fact that the parcel depicted on Exhibit B represents the 160 acres originally claimed by Walton, as depicted on the Chart No. 8237, mentioned in the December 1911 application. Neither affiant identified what they were told regarding the claim boundaries, or explained in any way how they determined the proper location of the boundaries.

BLM declined to accept the Tribe's December 2007 request since it was not filed by, or properly on behalf of, the true party in interest (Heirs) in accordance with Departmental regulations. Letter from BLM to Tribe, dated June 18, 2012. In a letter dated April 2, 2013, the Heirs resubmitted the December 2007 request, stating that it had been properly filed on their behalf. The 2013 request included affidavits from four individuals, each of whom attested that they are heirs of Walton's and that they "do adopt, ratify and confirm" the 2007 request.

In its June 2013 decision, BLM characterized the Heirs' request as "a request to . . . reopen and adjudicate [Walton's] Native allotment application A-01494 pursuant to Pence v. Kleppe," to the extent the request sought the additional 112.71 acres. Decision at 2. BLM's decision denied that request, concluding that reinstatement was inappropriate because "there are no remaining lands left to be adjudicated" since GLO had already adjudicated the application with finality when it issued the Certificate of Allotment. BLM stated:

There was no objection to the partial rejection of Rudolph Walton's allotment application, though notice [in the form of the April 4, 1912, decision holding the application for rejection] was provided pursuant to then-prevailing [due process] procedures. Nor, apparently, were any questions raised in the ensuing 83 years. Thus, there is no basis on which it can be concluded that the requirements of due process were violated or a manifest injustice took place.

Id. BLM's decision noted that GLO determined Walton "was not entitled to 160 acres, but he was entitled to the 44.5 acres described in his amended application" based on the field report's conclusion that Walton "did not establish use that was of sufficient frequency, duration or extent to constitute substantially continuous use and occupancy of 112.71 acres of his first application." *Id.* at 4-5. BLM further stated that the *Pence v. Kleppe* requirements had been met when Walton was notified that his original application was being held for rejection and Walton neither protested nor appealed. *Id.* at 6 (citing *Heirs of George Brown*, 143 IBLA 221, 229 (1998) ("[W]hat *Pence* required and what section 905(a) of ANILCA authorized was the Departmental

reexamination of those past cases in which an allotment application had been rejected with finality . . . and the reinstatement of those applications where either the minimum requirements of due process, as delineated by the court in *Pence v. Kleppe*, [529 F.2d 135 (9th Cir. 1976)], were not met or where a manifest injustice would occur were the application not to be reinstated.”)).

The Heirs timely appealed from the State Office’s June 2013 decision.

Discussion

The Heirs contend that GLO originally rejected Walton’s application for the full 160 acres of land permissible under the 1906 Act as to the 112.71 acres not allotted to him, and failed to afford Walton notice and an opportunity for a hearing, prior to that rejection, as required by *Pence v. Kleppe*. Statement of Reasons (SOR) at 11-12; Reply at 3-4. The Heirs state:

There is no evidence in the record that the BLM ever provided Mr. Walton with notice that his allotment had been amended or that Mr. Walton was entitled the opportunity to be heard regarding the amendment. . . . There is no document in the record titled ‘Decision,’ or any other letter addressed to Mr. Walton that could be considered a notification of the reduction of acreage from the original Application and the right to appeal.

SOR at 13. The Heirs further argue that Walton did not knowingly and voluntarily relinquish his application for the additional 112.71 acres of land, and therefore BLM is now required to reinstate and readjudicate the original application, affording them notice and an opportunity for a hearing before again rejecting the application as to the 112.71 acres. See Reply at 7-9 (citing *Heirs of Mabel M. Condady*, 176 IBLA 266 (2008)).

The issue before us on appeal, therefore, is whether Walton originally claimed 160 acres in his application or whether his claim was fully satisfied with the approval for allotment of 47.29 acres, to the exclusion of the additional 112.71 acres now sought by his heirs. The Heirs, as the party seeking reinstatement, have the burden to show, by a preponderance of the evidence, that BLM’s decision was in error. *United States v. The Heirs of David F. Berry*, 127 IBLA 196, 206 (1993).

A. Legal Framework

The Alaska Native Allotment Act (Act of May 17, 1906) granted the Secretary of the Interior authority to allot up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Native Alaskan Indian, Aleut, or Eskimo, 21 years old or the head of a family, upon satisfactory proof of “substantially continuous use and occupancy” of the land for a period of five years. 43 U.S.C. § 270-3 (1970). The 1906 Act was repealed by the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617 (2012), which Congress enacted on December 18, 1971, and which preserved applications for Native allotment applications pending on its 1971 date of enactment. On December 2, 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487. Section 905(a) of ANILCA provided for the legislative approval or adjudication, in certain circumstances, of Native allotment applications made pursuant to the 1906 Act that “were pending before the Department of the Interior on or before December 18, 1971.” 43 U.S.C. § 1634(a)(1) (2012).

On January 16, 1976, the Ninth Circuit Court of Appeals determined in *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976), that the Department of the Interior is required by the U.S. Constitution, before rejecting a Native allotment application on the facts, to afford the applicant procedural due process of law, since the applicant has a legally protected property interest in his Native allotment claim. 529 F.2d at 142; *see, e.g., Shirley Nielsen*, 158 IBLA 26, 52-53 (2002) (“This Board has long held that Native allotment applicants have property interests in their Native claims which entitle them to notice and an opportunity to be heard before their applications can be denied.”).

Since *Pence v. Kleppe*, we have therefore held that, under section 905(a) of ANILCA, Native allotment applications that were “erroneously rejected” without the benefit of notice and an opportunity for a hearing on a disputed question of fact regarding use and occupancy will be deemed to have been “pending before the Department of the Interior on or before December 18, 1971.” *Heirs of George Brown*, 143 IBLA at 228-29. We have further held that, regardless of the length of time since the original pre-December 18, 1971, adjudication of an application, when it is finally determined that BLM (or its predecessor) originally rejected a Native allotment application because the applicant failed to qualify, as a matter of fact, for an allotment, but without affording him or his heirs notice and an opportunity for a hearing, BLM’s decision is properly set aside, and the case remanded to BLM for reinstatement and readjudication of the application. *See, e.g., Jean F. Boone-Hamar*, 150 IBLA 18, 26-28 (1999); *William Demoski*, 143 IBLA 90, 93-94 (1998); *Forest Service (Heirs of Frank Kitka)*, 133 IBLA at 222; *Heirs of George Titus*, 124 IBLA 1, 4 (1992); *State of Alaska (Hazel L. Barlip)*, 109 IBLA 339, 343 (1989).

Section 905(a) of ANILCA, however, does not require the reinstatement of allotment applications that were properly rejected by the Department. *See generally Jean F. Boone-Hamar*, 150 IBLA at 28 (“[W]here rejection was premised on a disputed question of law, section 905(a) of ANILCA does not require that the adjudication be reopened.”); *Roselyn Isaac*, 147 IBLA 178, 183-84, 184 (“[N]o *Pence v. Kleppe* hearing is required if, when taking the factual averments of the application as true, the application is insufficient on its face, as a matter of law.”) (1999); e.g., *Heir of Jack Moore*, 174 IBLA 45, 54-55 (2008) (Reinstatement improper where application properly rejected as a matter of law, absent any evidence supporting alleged occupancy); *Erling Skaflestad*, 155 IBLA 141, 150-52 (2001) (same); *Heirs of George Brown*, 143 IBLA at 229-30 (same). As the Ninth Circuit has stated, to require reinstatement in this circumstance would be plainly contrary to the statutory purposes:

ANILCA’s requirement that the described applications be “adjudicated pursuant to the [1906 Act]” does not dictate that the Secretary readjudicate those applications which were already adjudicated under the [1906 Act]. Indeed, such an interpretation would directly contradict the purpose of Section 905(a). “Congress’ intent in enacting § 905 was to facilitate approval of the backlog of Native allotment applications by dispensing with the usual time-consuming adjudication procedures.” *Olympic v. United States*, 615 F. Supp. 990, 994 (D. Alaska 1985). If the Secretary were forced to readjudicate those applications already properly rejected under the [1906 Act], the backlog of applications would actually increase.

Silas v. Babbitt, 96 F.3d 355, 358 (9th Cir. 1996) (affirming the decision of the U.S. District Court for the District of Alaska, upholding a BLM decision denying a request to reinstate Native allotment application).

In determining whether reinstatement and readjudication is appropriate in any individual case, BLM must examine whether the agency originally adjudicated “the application the applicant intended to submit.” *Heir[] of Okalena Wassillie*, 175 IBLA 355, 361 (2008); *see also George Hoffman, Sr.*, 134 IBLA 361 (1996); *Matilda S. Johnson*, 129 IBLA 82 (1994). Where an applicant (or heir) claims that the acreage allotted to him was less than what was originally applied for, the appellant must show that the applicant’s original intent does not correspond to the acreage allotted to him. *See, e.g., Sophie Kaleak (Heir of Fred Hurley)*, 178 IBLA 217, 221-23 (2009); *Heirs of Mabel M. Condardy*, 176 IBLA at 273-74. Where the appellant can show that the applicant intended to apply for more acres than he received, the question to be answered is whether the applicant “voluntarily and knowingly relinquished” the lands not patented to him. *Heirs of Mabel M. Condardy*, 176 IBLA at 273, 274 (“Any relinquishment of a Native allotment application must be made voluntarily and with

knowledge of the applicant's allotment rights and the consequences of the relinquishment."), and cases cited.

Where, however, the appellant cannot establish that the applicant originally intended to claim more land than what was conveyed to him, the request for reinstatement effectively becomes an untimely request to amend the application under section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (2012), which provides that "no allotment application may be amended for location following adoption of a final plan of survey which includes the location of the allotment *as described in the application.*" 43 U.S.C. § 1634(c) (2012) (emphasis added); *see William M. Tennyson, Sr.*, 178 IBLA 138, 152 (2009); *Heirs of Alice Byayuk*, 136 IBLA 132, 138 (1996) ("[T]he adoption of [a plan of survey] cuts off any opportunity to amend the application."). As we have stated in previous decisions:

[S]ection 905(c) of ANILCA was intended to permit only the amendment of an allotment application so that it would accurately reflect the land that the applicant originally intended to claim, but that was misdescribed through some error in the application. Amendment to permit the substitution of new or additional land which the applicant had not originally intended to claim was not authorized.

Lydia M. Haviland, 179 IBLA 281, 294 (2010) (quoting *Heirs of Alice Byayuk*, 136 IBLA at 137); *see also Matilda S. Johnson*, 129 IBLA at 86 ("Since, in this case, the description originally provided by Johnson correctly described the land she sought, there was no room to apply section 905(c).").

B. There is No Evidence to Support the Heirs' Assertion that Walton Intended to Claim 160 Acres

[1] The Heirs assert that "[i]t is uncontested that Mr. Walton applied for 160 acres in 1911." SOR at 11. As noted above, however, and as the Heirs admit, in the "Notice" accompanying Walton's second application, filed in 1920, "the typewritten number of acres applied for, 160, was scratched out by hand. In its place, 44.5 acres was written in by hand." *Id.* at 7. The Heirs also admit that the Notice was signed by Walton and by his attorney, Stabler. *Id.* The Heirs note that there were no initials next to the change in the number of acres requested in the Notice, though they make no argument based on this fact. *Id.*

Other than the typewritten statement in the original December 1911 application, that Walton sought "160 acres," we find no support in the record for the Heirs' assertion on appeal. We have held that an original application for 160 acres, without additional evidence corroborating the applicant's original intent to claim

160 acres, is insufficient to require reinstatement. See *Sophie Kaleak (Heir of Fred Hurley)*, 178 IBLA at 221-23 (heir failed to establish that applicant originally intended to apply for 160 acres where the original handwritten application was for “approx. 160 acres,” but where the land description in the typed application and the map submitted to BLM with the original handwritten application both depicted two parcels aggregating 124.97 acres); *Heir[] of Okalena Wassillie*, 175 IBLA at 360-62 (original handwritten notation, “approx. 160 acres,” on sketch submitted with handwritten application fails to overcome typewritten application, including a land description depicting 120.60 acres). We have also held that there are instances in which there is sufficient evidence supporting an applicant’s original claim for 160 acres justifying reinstatement. See *Heirs of Mabel M. Condardy*, 176 IBLA at 273-74 (heirs established that applicant originally intended to apply for 160 acres where the original handwritten application was for “160 acres” and there was a corroborating letter from the Bureau of Indian Affairs specifically referring to an application for 160 acres); *Heirs of George T. Hoffman, Sr.*, 134 IBLA 361 (1996) (original handwritten application for 160 acres and other evidence that applicant originally claimed 160 acres sufficient to justify reinstatement); *Matilda S. Johnson*, 129 IBLA 82 (original application for 160 acres and other evidence that applicant originally claimed 160 acres sufficient to justify reversal of decision rejecting application as to 80 acres). However, no such evidence exists here.

In support of their argument, the Heirs state that in his original application, Walton claimed the land “as outlined on Chart 8237 in possession of the [U.S.] Survey[or] General.” SOR at 11. Neither Walton nor his heirs, however, ever produced the “Chart,” or any evidence regarding its contents. Nevertheless, the record shows that prior to submission of his original application, Walton was instructed to indicate on the Chart “the specific position and quantity of the land occupied or claimed by you on said island,” and to forward the marked Chart to the U.S. Surveyor General, who had been directed to survey the Island, “segregati[ng] therefrom . . . the land embraced in your claim.” Letter to Walton from Commissioner, dated May 11, 1912, at 2, 3. In addition, the U.S. Surveyor, who had previously received the unmarked Chart, was instructed by the Commissioner to have Warner survey the Island, “segregat[ing] the portion thereof claimed by Rudolph Walton.” Letter from Commissioner, dated Dec. 9, 1911, at 2. Warner did so, as reflected in GLO’s September 1920 letter to the Commissioner, which stated: “Biorka Island was surveyed by J. Frank Warner, U.S. Surveyor, in April, 1914, pursuant to instructions contained in your letter of December 9, 1911, . . . reserving this island for the Navy Department. The survey is #406. The . . . allotment [of Walton], under said survey, is 44.5 acres, which area was excluded from the Naval Reservation survey.” Letter from GLO, dated Sept. 25, 1920, at 1.

Therefore, while the record does not include the marked Chart, the record does include the 1914 survey approved by the U.S. Surveyor General. That survey does not depict a 160-acre parcel of land, but rather a 47.29-acre parcel of land, which was thereafter allotted to Walton. Moreover, we note that after GLO held Walton's original application for rejection because of the lack of a metes-and-bounds description of the land claimed, the Notice that accompanied Walton's second application described the land claimed as "[t]h[e] tract excluded, by actual survey, from Survey No. 406 of the U.S. Naval Reserve on Biorka Island," and thus the 47.29-acre parcel of land denoted as "Rudolph Walton's Indian Allotment" on that survey. We find nothing in GLO's April 1912 decision, holding the application for rejection, or its later March 1920 letter, delineating the extent of the application consistent with USS No. 406, Alaska, that explicitly or implicitly acknowledged Walton's application for a full 160 acres. Finally, the July 1920 GLO field examination later confirmed that the land claimed by Walton was "practically the same as surveyed" under the 1914 survey, encompassing evidence of use and occupancy, including improvements, by Walton. Letter to Commissioner from GLO, dated Sept. 25, 1920, at 2.

The evidence offered along with the Heirs' request for reinstatement, and again on appeal, is insufficient to establish that Walton originally intended to claim 160 acres. Unlike our decisions in *Heirs of Mabel M. Condardy* and *Heirs of George T. Hoffman*, the Heirs here have provided no corroborating evidence showing Walton's intent to claim 160 acres. Walton signed his amended application and the Notice accompanying that application and specifying that he was claiming "44.5" acres. He did so after his original application was held for rejection for failing to include a metes-and-bounds description of the lands claimed and consistent with the survey of his allotment, which identified his allotment as containing 47.29 acres. In addition, there is nothing in the record showing that GLO understood Walton's application to be for anything other than the 47.29 acres ultimately allotted to him.

Moreover, the Heirs' evidence, belatedly offered over 86 years after the Department's final adjudication of the application, fails to establish Walton's actual intent, and constitutes, at best, "self-serving statements," which, even if they had been made by Walton, do not raise an issue of fact regarding the scope of his application. *Roselyn Isaac*, 147 IBLA at 184; see, e.g., *Silas v. Babbitt*, 96 F.3d at 358 ("One cannot create an issue of fact by simply contradicting one's own previous statement"); *Heirs of Howard Isaac*, 146 IBLA 379, 380-81, 383-84 (1998) (statements of applicant's father attesting to applicant's use and occupancy prior to segregation of claimed land insufficient to raise question of fact regarding whether such use and occupancy predated segregation); *Lena Baker Maples*, 129 IBLA 167, 168, 170-71 (1994) (statements by applicant attesting to use and occupancy prior to segregation of claimed land insufficient to raise question of fact regarding whether such use and occupancy predated segregation).

We therefore conclude that Walton did not originally apply for the full 160 acres mentioned in his December 1911 application, but rather only the exact amount of land ultimately allotted to him.¹⁰

C. Walton, Not GLO, Amended the Original Application, and Thus GLO Did Not “Reject” 112.71 Acres from Walton’s Original Claim

The Heirs additionally assert that the fact that Walton’s second application was for 44.5 acres is not evidence that Walton, himself, amended the original application. The Heirs posit that “it is likely that the legal description [for the second application] was provided to Mr. Walton from the GLO and that Mr. Walton was instructed to use that legal description in the Second Application.” SOR at 13; Reply at 6 (“[T]he GLO never provided Mr. Walton with the specific reason for the rejection of a large majority of the acreage for which he had applied. The GLO only advised Mr. Walton the

¹⁰ The Heirs provided, on appeal, a copy of an “Excerpt” from the 1914 survey (Ex. E attached to the SOR), in which Warner indicates that Walton’s allotment claim is “partly bounded” by Symonds Bay to the north and by Rocky Cove to the south, which resulted in a shore frontage of more than the permissible 40 chains (or 160 rods). Excerpt at 1. It is unclear from where Warner, in 1914, obtained the restriction on shore frontage, since no such restriction on Native allotment applications existed at that time. While the Act of May 14, 1898, ch. 299, 30 Stat. 409, *as amended* by the Act of Mar. 3, 1903, ch. 1002, 42 Stat. 1028, 1029, provided that homestead entries in Alaska shall not “extend[] more than one hundred and sixty rods along the shore of any navigable water,” this restriction did “not apply to an Indian or Eskimo applicant or occupant of land under the act of May 17, 1906.” *Frank St. Clair*, 52 I.D. 597, 599 (1929) (“[The 1906 Act] is a special act relating to Alaska natives and is clearly separate and distinct from the act of May 14, 1898.”). It was not until 1935 that Native allotments were similarly restricted to no more than 160 rods along the shoreline. Circular, GLO, 55 I.D. 282, 283 (June 22, 1935); *see also Katmailand, Inc.*, 77 IBLA 347, 357-58, 360 (1983). In any event, Warner further stated that because of the restriction, “the acreage of this allotment was reduced by the peculiar shape of the shore and keeping the claim in proportionate length and breadth.” Excerpt at 1. Warner does not disclose the extent to which he “reduced” the allotment claim, or whether the claim originally encompassed a total of 160 acres. However, even if Warner reduced the acreage from a maximum of 160 acres down to the 47.29 acres covered by the survey, we find no objection by Walton and, in fact, Walton later embraced that claim in his March 1920 application.

acreage of land that was available to request.”).¹¹ BLM responds that Walton “chose to amend his application to encompass less acreage . . . in such a way to avoid having the whole application rejected for having more than 80 rods of shoreline.” Answer at 5, 7 (“Rather than have his whole allotment rejected, Mr. Walton in consultation with an attorney, made a choice to file a second application for less land which did not exceed the shoreline restrictions.”).

The Heirs have failed to point to any evidence in the record supporting their assertion that GLO, rather than Walton, amended the application. Rather, the record supports the conclusion that Walton amended the application in response to GLO holding the original application for rejection because of the absence of a metes-and-bounds description of the lands claimed. *Compare Heir of Ann A. Carney*, 176 IBLA 130, 142 (2008) (“In the 36 years since Carney first amended her application, neither Carney nor anyone on her behalf ever questioned it.”), *with Heir[] of Okalena Wassillie*, 175 IBLA at 361 (“In [*Matilda S. Johnson*, 129 IBLA 82, and *Heirs of George T. Hoffman, Sr.*, 134 IBLA 361,] . . . BLM took action that reduced the acreage described in the allotment applications for which the appellants had intended to apply.”), and *Forest Service (Heirs of Archie Lawrence)*, 128 IBLA 393, 396 (1994) (“The application was not amended by the applicant or his heirs. Instead, in 1920 GLO surveyed the allotment claim and altered the described boundaries to substantially reduce the acreage covered by the claim.”).

Moreover, GLO, in its September 25, 1920, letter to the Commissioner, noted that “Walton filed an amended application, describing the land in accordance with” the 1914 survey. Letter to Commissioner, dated Sept. 25, 1920, at 2. This statement, made at the time of Walton’s second application, reflects GLO’s contemporaneous understanding of events – *i.e.*, that Walton amended the application to clarify the land description, in response to GLO’s earlier direction in its April 4, 1912, letter, and in conformance with the 47.29-acre parcel described in the 1914 survey. In addition, immediately before Walton filed the amended application, GLO had notified Walton’s attorney, by letter dated March 3, 1920, that it had, in its 1914 survey, excluded a 47.29-acre parcel of land claimed by Walton under the 1906 Act from the effect of the October 1909 Executive Order, generally reserving the Island for naval purposes. We find no objection by Walton to GLO’s identification of the 47.29-acre parcel as the land claimed by him under the 1906 Act, or any assertion by Walton that he instead claimed

¹¹ In their request for reinstatement, the Heirs also made clear their position that GLO, not Walton, amended the application, stating that “on March 22, 1920, Mr. Walton’s allotment application was arbitrarily amended by the General Land Office.” Request for Reinstatement at 2.

the full 160 acres permitted under the Act. What the record shows is that Walton filed his March 1920 application specifically claiming the 47.29-acre parcel.

The Heirs also argue that GLO's April 4, 1912, letter holding the original application for rejection constituted a rejection as to the remaining 112.71 acres, and that GLO failed to provide Walton with notification of the rejection. SOR at 11 ("If BLM would have issued a notice to Mr. Walton informing him of the rejection and how to appeal, Mr. Walton would have had the notice and opportunity required by *Pence*."). The Heirs state:

The GLO determined [at the time of its April 1912 decision holding the application for rejection] that, of the 160 acres that Mr. Walton had selected, just 44.5 acres was available for a Native allotment subject to a 2.79 acre easement. There is no evidence in the record that shows that the GLO advised Mr. Walton that 112.71 [acres] of the requested allotment was rejected, and the BLM admits to this fact. . . . The GLO did not advise Mr. Walton at th[e] time [of its later March 1920 letter, advising him that he could apply for the 47.29 acres,] that he had an opportunity to object to the reduction in acreage of his Native allotment[.] . . . This action effectively served as a rejection.

Reply at 4. BLM agrees that Walton was never provided notice of the "rejection" of 112.71 acres from his application "because 112.71 acres of Mr. Walton's allotment were never rejected by the Department." Answer at 7. "Rather, Mr. Walton was informed that his first application would be rejected unless he took action because the metes and bounds description did not allow GLO to determine whether the entry exceeded the allowable shoreline restrictions." *Id.*¹²

Because we have concluded that Walton did not intend to apply for 160 acres and that Walton, and not GLO, amended the application, we are not persuaded by the Heirs' argument that GLO rejected 112.71 acres of Walton's allotment application.¹³

¹² We note that in its June 2013 decision, it appears that BLM took a different view, intimating that GLO did, in fact, reject Walton's application with respect to the 112.71 acres. See Decision at 4 ("The GLO determined Rudolph Walton was not entitled to 160 acres, but he was entitled to the 44.5 acres described in his amended application."), 5 ("The letter of April 4, 1912[,] was proper notification the 112.71 acres were rejected under the then-prevailing procedures.").

¹³ In circumstances where we have determined that, in the course of approving a Native allotment application for less than 160 acres, BLM also rejected the application
(...continued)

Further, we can discern no reason that GLO might have independently sought to reduce the acreage originally sought by Walton. In its May 11, 1912, letter to Walton, GLO acknowledged that the Navy was fully agreeable to allotting the land claimed by Walton, even up to the limit of 160 acres permissible under the 1906 Act, provided only that land was reserved for the Navy's use as a suitable landing place and station access. See Letter to Walton from GLO, dated May 11, 1912, at 1-2 ("As it appears from an investigation in regard to the matter made by the Navy Department . . . that your claim for the land actually used, or for the limit of 160 acres[,] would in no way interfere with the establishment of a wireless telegraph station upon the island").

D. Reinstatement in This Case is Not Precluded by the Doctrine of Administrative Finality

As a final matter, we note that in its June 2013 decision, BLM expressly held that reinstatement of Walton's allotment application for the purpose of adjudicating his entitlement to the remainder of the 160 acres originally applied for (*i.e.*, 112.71 acres) is precluded under the doctrine of administrative finality because he "fail[ed] . . . to appeal from the April 4, 1912[,] decision holding his application for rejection," asserting that the decision became final for the Department, in the absence of any appeal. Decision at 4 (citing, *e.g.*, *Melvin Helit v. Gold Fields Mining Corp.*, 113 IBLA 299, 308-09, 97 I.D. 109, 114 (1990)); *see id.* at 5 ("The notice to Rudolph Walton . . . that his application was held for rejection, when no protest or appeal was taken, became final for the Department"). BLM is incorrect.

[2] It is well established that a decision holding an application for rejection, pending compliance with a specified requirement, is interlocutory in nature and not itself subject to appeal. See, *e.g.*, *Fortune Oil Co.*, 71 IBLA 153, 156 (1983) ("[W]here . . . a decision clearly contemplates that rejection will occur upon the running of the prescribed period, such a decision is interlocutory. It is, in effect, an interim determination affording an applicant an opportunity to correct a perceived deficiency prior to rejection of the application.") (quoting *Carl Gerard*, 70 IBLA 343, 346 (1983)). Further, given the nature of the April 1912 decision, rejection of Walton's application would occur only once Walton failed to comply with the requirement of the decision (*i.e.*, to submit a metes-and-bounds description of the lands claimed), and a decision rejecting the application was issued. That did not occur here. The April 1912

(...continued)

as to some portion of 160 acres, we have specifically found that the original application sought the full 160 acres. See *Matilda S. Johnson*, 129 IBLA 82; *Heirs of George T. Hoffman, Sr.*, 134 IBLA 361. This is not the case here.

decision holding the application for rejection therefore could not, in the absence of an appeal, become final for the Department.

Thus, to the extent that BLM relies, in its June 2013 decision, on its erroneous conclusion that GLO's April 1912 decision, holding Walton's application for rejection, was administratively final for the Department, we hereby modify that decision.

Conclusion

Given the evidence of record and offered on appeal, we find that the Heirs have not met their burden to show, by a preponderance of evidence, that Walton ever applied for more than the 47.29 acres, which he was ultimately allotted. We therefore conclude, paraphrasing *Heir of Ann A. Carney*, 176 IBLA at 142-43, that "the amended application for approximately [47.29] acres was the application [Walton] intended to submit, and that BLM properly rejected the Heir[']s ['] [current] request to add acreage to the application." Since we conclude that Walton's application was properly adjudicated by GLO in 1921, and absent any showing of a violation of due process or other compelling legal or equitable reasons, we find no justification for reinstating the application, and thus must affirm BLM's 2013 decision to deny reinstatement.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed as modified.

_____/s/
Amy B. Sosin
Administrative Judge

I concur:

_____/s/
Christina S. Kalavritinos
Administrative Judge